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No. 413

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

RAFAEL CRUZ,

Petitioner,

PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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In the

Supreme Court of the United States

OCTOBER TERM, 1962

No. .....

Rafael Cruz,

Petitioner,

v.

The People of the State of New York,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner Rafael Cruz respectfully shows to this Honorable Court the following:

The Determination in the Court Below

The petitioner was convicted on February 16, 1962 of the crime of murder in the first degree during the commission of a felony (Penal Law Par. 1044, Subd. 2) in the then constituted court of General Sessions, County of New York, after a trial (Culkin, J. and a Jury) and sentence of death having been duly imposed on the 21st day of March, 1962; and upon appeal to the Court of Ap-

peals of the State of New York, the Judgment of conviction and sentence for the crime was affirmed without an opinion on the 21st day of February 1963; and on that day also a warrant was issued by the Court of Appeals of the State of New York fixing the Week commencing Monday, the 8th day of April, 1963, as the week during which the sentence of death was to be executed upon the petitioner herein, and the Court of Appeals of the State of New York did thereafter on the 4th day of April 1963, granted defendant's motion to amend the remittitur by adding thereto the following:

> "Motion to amend the remittitur granted, the return of the remittitur requested and, when returned, it will be amended by adding thereto the following: Upon the appeal herein there were presented and necessarily passed upon questions under the Constitution of the United States, viz: Appellant contended that he was convicted on evidence obtained by unlawful search and seizure in violation of his rights under the Fourth and Fifth Amendments to the Constitution of the United States, and that such unlawful search and seizure deprived him of his constitutional right to privacy under the Fourteenth Amendment of the Constitution of the United States. The Court of Appeals held that the appellant's constitutional rights were not violated."

And the petitioner made application for a Stay of the Judgment and the Warrant of the Court of Appeals of the State of New York pursuant to Title 28, U.S.C. Section 2101(F) pending the making and determination of a petition for certiorari to the Supreme Court of the United States and the said Stay of Execution was duly signed by the Honorable Stanley A. Fuld, Associate Judge of the Court of Appeals of the State of New York on the 5th day of April 1963.

Basis of Jurisdiction

The Jurisdiction of this Court is invoked under Rule 19 of the Rules of the Supreme Court of the United States and Title 28, United States Code, Section 1254 and all applicable sections of Federal Law on the ground that the Court of Appeals of the State of New York has without an opinion decided a Federal question of substance and on the further ground that the amended remittitur herein recited grants permission to present the Writ of Certiorari for meritorious consideration by the Supreme Court of the United States.

The Facts

The defendants Rafael Cruz, Carmen Ryes, and Wilfredo Perez were indicted for the crime of murder in the first degree during the commission of a Felony (Penal Law Par. 1044, Subd. 2, in that, the defendants in the County of New York on or about July 16, 1961, wilfully, feloniously and of malice aforethought struck and killed Lo Pen with a knife.

The petitioner along with Carmen Reyes and Wilfredo Perez were at a bar on the lower East side of Manhattan on the night of July 16, 1961 and drinking for some hours at the bar. The alleged plan among the three co-defendants as contended by the prosecution was that the said defendants were to go to 305 Broome Street, New York City and allegedly to go to an apartment in said building and rob a Chinese and then supposedly the said co-defendants were to split the proceeds.

There was no direct proof nor eye witness of the supposed robbery of Lo Pen nor of the alleged attempt to commit the robbery nor of the alleged murder although allegedly one Jim Ching, an occupant of apartment No. 11 of said building did at 4 A. M. on July 16, 1961 allegedly

perceive one Carmen Reyes and petitioner while Jim Ching squatting was in a position at the door looking out a peephole of said apartment ½ inch in length and ¾ inch in width and some 2 foot 8 inches from the floor and supposedly saw the co-defendants Reyes and Cruz with their back to the aforesaid Jim Ching and close to apartment #11 with a light bulb of 25 watts representing the only available light and that some time later Lo Pen was murdered. The prosecution's main witness Jim Ching did not testify before the Grand Jury nor did he identify the defendant Cruz at a line-up in the Police Station which the District Attorney of New York County concedes.

The evidence obtained in apartment No. 13 at 81 Allen Street, New York City where Reyes and petitioner reside, a knife and pocket-book of Carmen Reyes, although she was not on trial and yet had entered a plea of guilty to Manslaughter in the Second Degree, constitutes the basis of this application for a Writ of Certiorari as the said Carmen Reyes lived as a common-law spouse of Raphael Cruz the petitioner herein.

The entry by five police of the Police Department of the City of New York without consent into aforesaid apartment some two to three hours after the alleged murder into 81 Allen Street, New York City, was without a search warrant or warrant of arrest and was based on a hunch by Patrolman Ihle that Carmen Reyes was the girl in question since she had long black hair; a black and white pocket-book and was a Puerto Rican and that the said Patrolman recalled two nights before the killing a Puerto Rican girl with long black hair had complained of her lover to this patrolman of his mistreatment.

In the most heavily populated Puerto Rican area of New York City where long tresses, black and white pocket-books and Puerto Ricans are as common as a single stick of wheat in a wheatfield in Kansas this hunch of Patrol-

man Ihle now brings this vital question to the highest Court of the land.

The defense counsel timely moved to suppress the evidence of the knife and the white and black pocket-book owned by Carmen Reyes on the Voir Dire of Detective John J. Furst (f. 384) and likewise of any oral statements made by the petitioner although said oral statements had later been denied as admitted by the Prosecution several times to the same detective at the Police Station and Wilfredo Perez declared to be the actual killer. Wilfredo Perez received 10 to 20 years while Carmen Reyes received a lighter sentence.

The Question Presented for Review

1. Was there an unreasonable search and seizure within the purview of the Fourth Amendment in the instant case based upon lack of probable cause and the failure of the Police of the City of New York to obtain a search warrant or warrant of arrest to enter the premises.

2. Was there lack of consent on the part of the petitioner so as to render illegal the alleged evidence so seized and the oral statement obtained after arrest but prior to arraignment all in contravention of the Fourth, Fifth and Fourteenth Amendments of the Constitution of the United States.

Applicable Constitutional Statutory Provisions

(a) The Bill of Rights of the United States Constitution; Article IV:

> "The right of the People to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, shall not be violated and no warrant shall issue but upon probable cause, supported

by oath or affirmation and particularly describing the place to be searched, and the persons or things to be seized."

(b) The Bill of Rights of the United States Constitution, Article V:

"No person shall be held to answer for a capital or otherwise infamous crime unless * * * nor shall be compelled in any criminal case to be a witness against himself nor be deprived of life, liberty, or property without due process of law."

(c) Constitution of the United States, Section 1, Fourteenth Amendment:

"* * * nor shall any person be deprived of life, liberty or property without due process of law."

POINT ONE

The trial Court committed reversible error when it denied a motion to suppress illegally obtained evidence during the course of the trial as there was an unreasonable search and seizure within the purview of the Fourth Amendment in the instant case based upon lack of probable cause and the failure of the Police of the City of New York to obtain a search warrant or warrant of arrest to enter the home; consent to the search under the circumstances could not have been properly obtained; any alleged admission or statement by Cruz in view of the above was improperly received at the trial.

The evidence obtained in apartment No. 13 at 81 Allen Street, to wit: the knife and pocketbook of Carmen Reyes were seized without any warrant of arrest and search warrant. This is undeniable. The prosecution contended that the door was opened by Carmen Reyes after she re-

moved a wire chain (f. 264), and after Detective Furst said, "Detective", there was no lock on the door, and she joined with Cruz in saying "Go ahead and search", but Carmen Reyes and Cruz were not placed under arrest until after the search was completed, as they were arrested at the apartment not at the police station. In accordance with Section 813 of the Code of Criminal Procedure, a motion to suppress during the course of trail is proper.

Proof of the crime had to depend on the evidence obtained during the search prior to the arrest (f. 379):

"Q. Somebody did come in right after you? A. Yes, the uniformed patrolmen came in.

Q. The four uniformed patrolmen came right in after you, didn't they? A. I don't know. At least, two others came in with me.

Q. Oh, two of the other patrolmen came in with you? A. Behind me.

Q. Right behind you? A. I don't know if it was right behind me.

Q. It wouldn't have been more than a fraction of a second, would it? A. Yes, it was in the same time. She opened the door and got back in bed.

Q. And you walked right in? A. I walked in and picked up the pocketbook.

Q. They walked in behind you? A. They evidently did.

Q. Did you display a warrant to her at that time? A. No.

Q. Did you tell her she was under arrest at that time? A. No, I was questioning her about the pocketbook.

Q. Yes or no? No, when you walked in and you saw her, did you tell her she was under arrest? A. No, because she told me to come in, and I came in.

Q. Now, did you place her into custody after you obtained People's Exhibits 5 for identification and 6 for identification? A. Yes."

Mr. Holley: No further questions.

Mr. Loguen: I have no other questions, if your Honor please.

The Court: All right. Do you want to say anything, Mr. Holley?

Mr. Holley: Yes, your Honor. I think we are at the stage where Mr. Loguen offered People's Exhibit 5 for identification and I objected and requested an examination on the voir dire.

Mr. Loguen: I didn't offer it in evidence. I think I just had one or two marked for identification.

Mr. Holley: You offered it for identification and it was marked.

The Court: Yes.

Mr. Holley: Now, if your Honor pleases, I respectfully except—object to the acceptance of People's Exhibits 5 for identification and 6 for identification, at any time, predicated upon the present evidence, on the ground that the evidence was obtained in violation of the defendant's Constitutional rights under the Fourth and Fourteenth Amendments of the United States Constitution, basically predicated upon the fact, accepting Patrolman Ihle's testimony as truthful, that there was no reasonable cause to believe that either the defendant Cruz or the codefendant Reyes had at that time committed a crime, and, therefore, the entry into the apartment was an illegal entry, all searches, all seizures, all observations and all statements made by any of the defendants, including the defendant Cruz—

The Court: Any statements?

Mr. Holley: Any statements made by any of the defendants are inadmissible.

The Court: That motion is denied, and you have an exception.

Mr. Holley: Exception.

The Court: Bring in the jury.

PETER J. BRENNAN, Patrolman, resumed the stand and testified further as follows:

Direct Examination by Mr. Loguen (Continued):

Q. Now, Patrolman Brennan, I believe you testified that you got up to premises 81 Allen Street, apartment 13, around what time? A. About 7:25.

Q. And I think you testified that there was a chain on the door and no lock. Is that correct? A. That is correct.

Q. And you testified that finally you were let in by this woman. Is that correct? A. Yes, sir.

Mr. Holley: I object to that, if your Honor please. Mr. Loguen is now testifying.

The Court: Well, he is bringing the witness up to date. And the witness is being continued.

Mr. Loguen: Then, if your Honor please, I will ask the Stenographer to read all of the testimony, the last few questions and answers, back—

The Court: No, no. Take it from there, Mr. Loguen.

Q. Now,—I am going from here—I show you People's Exhibit 5 for Identification, and I ask you: do you recognize it? (showing pocketbook to witness) A. Yes, sir.

Q. Where did you see it for the first time? A. On a chair in apartment 13 at 81 Allen Street.

Q. What happened, if anything, with respect to this pocketbook? A. Detective Furst took it.

Q. What, if anything, did Detective Furst do or say after he picked up this pocketbook? A. He asked—

Mr. Holley: Objection to what Detective Furst said.

The Court: Sustained.

Mr. Loguen: I'm sorry, your Honor: I did not hear the objection.

The Court: The objection was on the ground that you are asking him to tell what Detective Furst said.

Q. What happened after Detective Furst picked up People's Exhibit 5 for Identification? A. He asked the woman, Carmine, some questions about it.

Q. Yes? A. He asked her if this was her pocketbook, and she answered yes. He asked her if she had it with her earlier in the evening, and she said yes.

Q. Yes? A. That's all.

Q. Go ahead. What happened then? A. Then—

Mr. Holley: If your Honor please, at this time may I have an objection to any conversations with Carmine Reyes not in the presence of the defendant?

The Court: Well, you will have to make them as the time comes.

Q. Where was the defendant at that time, Patrolman? A. The defendant Cruz was lying in bed, on his back.

Q. Where was Carmine Reyes? A. Carmine was laying beside him, on her back.

Q. In the bed? A. In the bed.

Q. Were they side by side? A. Side by side.

Q. What happened then? What was said? A. Then Detective Furst asked some more questions, which I don't recall.

Q. Yes? A. And the defendant Cruz said, 'Go ahead and search. I don't have anything to hide.' Carmine said, 'Yes; go ahead and search.'

Q. 'Search' what? A. The apartment. As soon as they said 'Go search', I stepped up on the side of the bed to a wardrobe that was there, I lifted up some clothing that was there, and I found this knife—a knife underneath the clothing.

Q. Now, Patrolman Brennan, will you describe this room that you were in, as best you can? A. It was a bedroom, probably eight feet by ten feet, and had a bed in it, a chair, and a wardrobe closet.

Q. Now, where did you say you found this knife? A. I found the knife on top of the wardrobe closet, underneath some clothing.

Q. Where was the wardrobe closet? In what room? A. It is in the bedroom, next to the bed.

Mr. Loguen: May we approach the bench a minute, if your Honor please?

(Counsel on both sides approach the bench and confer with the Court, off the record, out of the hearing of the jurors and witness.)

Mr. Loguen: May I have this marked for identification, if your Honor please?

(The Jackknife, heretofore marked People's Exhibit 6 for Identification on the special proceeding had out of the presence of the jury, was now remarked in the presence of the jury People's Exhibit 6 for Identification.)

Q. Now, I show you People's Exhibit 6 for Identification, and I ask you: do you recognize it (handing to witness)? A. Yes, sir.

Q. When and where did you see it for the first time? A. On the top of that wardrobe dresser in apartment 13 at 81 Allen Street.

Q. What, if anything, did you do with that exhibit? A. I immediately gave it to Detective Furst.

Q. And did you thereafter leave this room? A. Yes, sir.

Q. And who did you have in custody? A. I escorted Carmine to the station house in a radio car.

Q. And were Cruz and Carmine Reyes placed in custody— A. Yes, sir.

Q. —by Detective Furst? A. By Detective Furst.

Q. He was in charge of the investigation. Is that correct? A. Yes, sir."

There was no crime being committed in the presence of the police officer, when they entered the apartment. There was only a lead, which the detective had from Patrolman Hile and which was a hunch and a suspicion, and acting on same, the police, without a search warrant or warrant of arrest, invaded the apartment. In *Mapp* v. *Ohio*, 367 U. S. 645, the Court noted at page 645:

> "At the trial no search warrant was produced by the prosecution, nor was the failure to produce explained or accounted for. . ." (p. 662)

The close inter-relationship between the Fourth and Fifth Amendments, as they apply to this problem, has long been recognized and indeed has expressly made the ground for the Court's holding in *Boyd* v. *U. S.*, 116 U. S. 616.

The prosecution failed, in the case at bar, to show probable cause for the arrest. There was no crime committed in the presence of the detective, nor any probable cause that a felony had been committed by these defendants. A search, which is unreasonable for want of probable cause, cannot be made reasonable by what the search uncovers.

In law it is good or bad when it starts and does not change character from its success. It is not made reasonable by what it brings to light. (*Byars* v. *U. S.*, 273 U. S. 28; *Johnson* v. *U. S.*, 333 U. S. 110; *McDonald* v. *U. S.*, 335 U. S. 198/App. Div. 629.)

The requirement of probable cause for arrest without a warrant is surely no less exacting than is the necessity for probable cause to obtain a warrant of arrest. The quantity and quality of proof is the same, otherwise no officer need even apply for an arrest warrant.

In *Dire* v. *U. S.*, 331 U. S. 581, the Court held that searches of both the person arrested and the place where

the arrest is made derived their legality in the absence of a search warrant from the existence of a lawful arrest. Without probable cause to arrest, subsequent searches, either of person or property, violate the Fourth Amendment.

In the case at bar, such an arrest based upon suspicion alone is unlawful, and the product of the incidental search is inadmissible. (See, *Henry* v. *U. S.*, 361 U. S. 98; *Miller* v. *U. S.*, 357 U. S. 301; *Greene* v. *U. S.*, 259 F. 2d 180.)

Patrolman George Ihle testimony was as claimed by the prosecution the probable cause for the arrest of Cruz. From the testimony as herein recited it would appear to be the improbable cause for the arrest with the word "description" used where it is no description.

"Q. All right. Where did you go then? A. Went back to 305 Broome Street.

Q. Now, did you see Detective Furst at that time? A. I met Detective Furst up there, yes.

Q. Did you have a talk with him? A. Yes, sir.

Q. What did he tell you? A. He told me that another witness in the building had given a description similar to one given me by Mr. Sim.

Q. A description of whom? A. Of three persons, two male and one female, Puerto Ricans.

Q. All three, or two? What did he tell you? A. Two male and one female Puerto Ricans.

Q. Who did he say gave the descriptions? A. One of the occupants of the building.

Q. Did he tell you what the occupant said that he saw? A. Then he told me that there was a—said there was a—one of the people living in the building said he saw through a peephole the female involved and also the male involved here.

Q. Right. And did he indicate to you what this occupant had told him as to their nationalities; these

people that he saw? A. Yes. He says, apparently Puerto Ricans.

Q. Do you recall if he gave you any other description? A. He said the female had a white pocketbook; white and black."

The traditional round-up of persons with records of similar crimes for questioning or for investigation or upon an "open charge" will not support an incidental search of the person or the premises where the arrest is made.

The evidence obtained in apartment No. 13 at 81 Allen Street, New York City, to wit, the knife and pocketbook of Carmen Reyes were seized without any warrant and the probable cause to sustain the arrest into the apartment was based on only the following facts:

a. Patrolman Ihle had supposedly visited 81 Allen Street, New York City two days before the killing of Lo Pen on a complaint by Carmen Reyes against the petitioner.

b. That Carmen Reyes had black tresses and was a Puert Rican as well as her companions.

c. A Puerto Rican woman had a black and white bag.

In *People* v. *Loria*, 10 N. Y. 2d 368, the validity of an arrest or an entry to effect an arrest without a warrant depends on there being probable cause to make the arrest. That probable cause, however, cannot be based upon evidence obtained as a result of the search, when the validity of the search itself depends upon the legality of the arrest.

Legality in the absence of a search warrant from the existence of a lawful arrest without probable cause to arrest, subsequent searches either of person or property violates the Fourth Amendment. In the case at bar, the search preceded the arrest by one-half hour.

It is mainly when an officer arrests without a warrant for a felony not committed in his presence (C. C. p. 177,

Subsecs. 2, 3, 4) and makes an incidental search that serious issues confront the Court.

If the arrest is considered at the moment of accosting, frisking and assumption of dominion over appellant's person constitutes an arrest.

Before the officer decides to "do it himself", "probable cause", which if presented to a neutral magistrate, would justify the Court in issuing a warrant for the person to be arrested. The requirements of "probable cause" and the *quantum* of proof in each instance are identical.

The prosecution in the case at bar has attempted to spell out consent. The Court's attention is directed to "The Pleader" (a comment on the Law of Search and Seizure) by the Honorable Judge Nathan R. Sobel, County Judge, Kings County, at pages 90 and 91:

To put the matter bluntly, experienced judges must surely have observed the commonplace and almost habitual tendency of police officers to attribute admissions to policy and narcotic offenders. They may expect police officers to attempt to justify unreasonable searches by attributing consent to such offenders. It will often be offensive to common sense and human experience to believe that such offenders would consent to a search knowing the police officers will find contraband. When judges accept or become indifferent to policy testimony inherently improbable, the constitutional protection disappears through tacit nullification.

It is significant that Appellate Courts have rarely affirmed any finding of consent except where factual circumstances indicate that consent was entirely probable.

It is the right of one faced with authority to submit and to receive his defense for the Courts an inference of consent from a failure to engage in a discussion as to the officer's authority is not warranted, consent cannot be

found from submissiveness or the neglect or failure to argue with a police officer. In fact, intimidation and duress are almost necessarily implicit in such situations (*Higgins* v. *U. S.*, 333 U. S. 10). In *Higgins* the householder said "all right", the officer was "perfectly welcome to look anywhere in the room." In *Johnson* v. *Zerbst* the officer testified "the householder stepped back acquiescently and admitted us." In both cases it was held there was no consent.

The burden of the People to establish consent is particularly heavy where the defendant has been arrested and is confined in the police precinct or in jail. Thus in *Channel* v. *U. S.*, 285 F. 2d 217, where the arrestee said, "no, my apartment is clean. There is nothing there, you can go out and search the place", it was nevertheless held that there was no consent. In *Judd* v. *U. S.*, 190 F. 2d 649, the arrestee said "I have nothing to hide. You can go there and see for yourself"; held no consent. See also *U. S.* v. *Arrington*, 215 F. 2d 630; *U. S.* v. *McCann*, 40 F. 2d 295; *People* v. *Jennings, Calif.*, 298 F. 2d 56.

In the case at bar, 5 police officers with guns crowd around an apartment door; the chain is unlocked and the door is opened. Permission granted to enter is neither consent nor invitation. In such a situation consent is at least impliedly coercive (*U. S.* v. *Marquette*, 271 F. Supp. 120; *Waldron* v. *U. S.*, 219 F. 2d 37) and if the police appear with drawn guns it is actually coercive (*Catalanate* v. *U. S.*, 208 F. 2d 264).

It is axiomatic that Courts indulge every reasonable presumption against waiver of fundamental constitutional rights (*Johnson* v. *Zerbst*, 304 U. S. 458).

Consent to search is not to be lightly inferred. *U. S.* v. *Page*, 302 F. 2d 81; *U. S.* v. *Dornblut*, 261 F. 2d 949. Without such incrimination the evidence against Cruz is negligible.

The prosecution further contends that the search of the defendant's home was incidental to his arrest and therefore lawful. The evidence does not support this view. The arrest of the defendant followed the unlawful search and was based upon evidence obtained from the defendant as the result of the unlawful search. The prosecution may not justify the arrest by the search and at the same time justify the search by the arrest. "An officer gaining access to private living quarters under color of his office and of the law which he personifies must then have some valid basis in law for the intrusion. Any other rule would undermine the right of the people to be secure in their persons, houses, papers and effects * * *" *Johnson* v. *United States*, 1948, 333 U. S. 10, 16-17; *Gouled* v. *U. S.*, 255 U. S. 298.

The burden of proof in an arrest without a search warrant is on the prosecutor and the prosecutor must prove by clear and convincing evidence that consent to search was free and voluntary.

U. S. v. *DeVito*; D.C.N.Y. 190 F. Supp. 443;
Channel v. *U. S.*, 285 F. 2d 237;
Contreras v. *U. S.* 291 F. 2d 196.

In the case at bar as in the case of *People* v. *Rodriguez*, 11 N. Y. 2d 279 at page 286, the alleged admission is excluded:

> "Upon the trial, and on this appeal, Rodriguez argued that certain statements of his were improperly received in evidence, that he had been induced to confess to the killings after being confronted with a gun and other articles illegally obtained from his room. If, as he asserts, any of his statements were the product or fruit of an illegal search and seizure, they should have been excluded; the rule announced in *Mapp* v. *Ohio* (367 U. S. 643) renders inadmissible

not only the items obtained, but any evidence which stems from their use. As the Supreme Court put it, 'The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all.' * * * If knowledge of [facts] is gained from an independent source they may be proved like any others, but the knowledge gained by the Government's own wrong cannot be used by it in the way proposed.' (*Silverthorne Lbr. Co.* v. *United States*, 251 U. S. 385, 392; see, also, *Costello* v. *United States*, 365 U. S. 265, 278-280; *Walder* v. *United States*, 347 U. S. 62, 64-65; *Nardone* v. *United States*, 308 U. S. 338, 340-341.) In short, the exclusionary rule covers not only the evidence illegally obtained, but the product of the unlawful search as well. 'The underlying rationale is that government may not violate the constitutional guarantee (U. S. Const., 4th Amdt.) and 'use the fruits of such unlawful conduct to secure a conviction.' (*Walder* v. *United States*, 347 U. S. 62, 64-65, *supra*.) And, obviously, it matters not that these 'fruits' happen to be confessions rather than some other type of evidence. (Cf. *Costello* v. *United States*, 365 U. S. 265, 278-280, *supra*.)'

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

JAMES J. HANARAHAN.

APPENDIX

Opinion of Court of Appeals.

COURT OF APPEALS

STATE OF NEW YORK

February 21, 1963—Conviction affirmed—No opinion.

Amended Remittitur Judgment.

DECISION

COURT OF APPEALS

April 4, 1883

Mo. No. 271

The People &c.

Respondent,

Vs.

Rafael Cruz,

Appellant.

Motion for reargument denied.

Motion to amend the remittitur granted, the return of the remittitur requested and, when returned, it will be amended by adding thereto the following: Upon the appeal herein there were presented and necessarily passed upon questions under the Constitution of the United States, viz: Appellant contended that he was convicted on evidence obtained by unlawful search and seizure in violation of his rights under the Fourth and Fifth Amendments to the Constitution of the United States, and that such unlawful search and seizure deprived him of his constitutional rights to privacy under the Fourteenth Amendment of the Constitution of the United States. The Court of Appeals held that the appellant's constitutional rights were not violated.

Judgment.

Part 6, March 21, 1962

Name of Counsel Present—Benjamin Epstein, Esq.

Stenographer—Louis Frank

Sec. 480, Code Cr. Pro., Complied with

Rafael Cruz, indicted as Rafel Cruz for the murder in the first degree of Lo Pen whereof you on conviction be, and you are hereby sentenced to the punishment of death; and it is ordered that within two days after this day's session of the Court. The Commissioner of Correction of the City of New York deliver you Rafael Cruz indicted as Rafel Cruz together with the warrant of this Court to the Warden of the Sing Sing Prison at Ossining, New York where you shall be kept in solitary confinement until the week beginning Monday May 7, 1962 and upon same day within the week so appointed the said Warden of the Sing Sing Prison at Ossining, New York is commanded to do execution upon you Rafael Cruz indicted as Rafel Cruz in the mode and manner prescribed by the Laws of the State of New York.

GERALD P. CULKIN,
Judge of the Court of General Sessions.

Part 6, March 21, 1962

Motions by defendant's attorneys to set aside verdict of jury be—is after careful consideration in all things

Denied.

Judge GERALD P. CULKIN.

April 6, 1963

Judgment and Warrant issued Feb. 24, 1963 stayed by Order of Fuld, J., Court of Appeals.

Apr. 8, 1963.

Order filed (in file)

Certificate.

I hereby affirm that I am a Counsellor-at-Law of the State of New York, and duly admitted to the Supreme Court of the United States and make this application for a Writ of Certiorari in good faith and not for the purpose of delay.

JAMES J. HANRAHAN.

Order.

STATE OF NEW YORK,

IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the Fourth day of April A. D. 1963.

Present, HON. CHARLES S. DESMOND, Chief Judge, presiding.

Mo. No. 271

THE PEOPLE &c.,

Respondent,

vs.

RAFAEL CRUZ,

Appellant.

A motion to amend the remittitur in the above cause having been heretofore made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is granted, the return of the remittitur requested and, when returned, it will be amended by adding thereto the following:

> Upon the appeal herein there were presented and necessarily passed upon questions under the Constitution of the United States, viz: Appellant contended that he was convicted on evidence obtained by unlawful

search and seizure in violation of his rights under the Fourth and Fifth Amendments to the Constitution of the United States, and that such unlawful search and seizure deprived him of his constitutional right to privacy under the Fourteenth Amendment of the Constitution of the United States. The Court of Appeals held that the appellant's constitutional rights were not violated.

And the Supreme Court of New York County is hereby requested to direct its Clerk to return said remittitur to this Court for amendment accordingly.

A copy

Gearon Kimball,
Deputy Clerk.

(Seal)

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FILED
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No. 413

Supreme Court of the United States

October Term, 1963

RAFAEL CRUZ,

Defendant-Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

FRANK S. HOGAN
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Supreme Court of the United States

October Term, 1963

RAFAEL CRUZ,

Defendant-Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Statement

This is a petition for a writ of certiorari to the New York State Court of Appeals to review a decision of that Court, rendered February 21, 1963, unanimously affirming, without opinion, a judgment of the Court of General Sessions, New York County (Culkin, J. and a jury) entered March 21, 1962, convicting the petitioner of the crime of Murder in the First Degree, and sentencing him, absent a jury recommendation for life imprisonment, to the punishment of death.

Introduction

In the dark hours of early morning, July 16, 1961, Lo Pen, a shadow victim aged 58 or 59, was returning home when he was accosted by a trio of armed robbers lurking in the hallway, and, upon his scream of "robbery," he was murdered by the single thrust of a knife deep into his heart. Both Carmen Reyes and Wilfredo "Bolo" Reyes pleaded guilty (1229), and the participation of the defendant Rafael Cruz in the killing was established by evidence so overwhelming that its weight was not even challenged on appeal.

The presence of these three at the murder scene was attested to by the eye-witness observations of Jim Ching, who identified the defendant as being at the scene of the crime (436), and corroborated by the report of an abortive attack about ten minutes earlier on Wong Sim at the same premises. Further means of identification was provided by the black-and white handbag of Carmen Reyes which was noticed by Jim Ching (519-20, 641-3), and subsequently found bearing blood stains in the room occupied by the defendant and his mistress.

Hector "Cura" Mateo testified to admissions of complicity made to him by the defendant immediately following the crime (564, 1154). Moreover, the act of the defendant in changing from a bloody shirt to a clean one specifically to avoid detection further demonstrates his awareness of guilt (573, 1154-3).

And finally there is the complete confession of the defendant, incorporated into a written statement, which de-

Reference, unless otherwise indicated, is to pages of the trial.

tails the crime from its conception in a bar to its consummation in the apartment house (1117-64). The confession discloses the conspirators' decision to "take a chink," and the development of a plan wherein Carmen Reyes was to gain entrance to an apartment by soliciting a victim with an offer of a sexual liaison, and while one man served as look-out, the other would rob the victim. Although initially frustrated by the caution of the apartment's occupant, the trio remained in the hallway to rob whoever might be so unfortunate as to come upon them. When the lone Chinese, Lo Pen, entered the building and climbed the stairs, he was marked as the victim. Carmen Reyes accosted him, he screamed, "Robbery" and was stabbed to death.

Question Presented

Whether the search of the petitioner's apartment and the seizure of a knife and a handbag therefrom violated the Fourth Amendment of the United States Constitution in that it was neither incident to a valid arrest nor based on voluntary consent.

POINT I

The motion to suppress the introduction of the knife (Exh. 6) and the handbag (Exh. 5) into evidence was properly denied [answering petitioner's Point I, pp: 6-18].

A. The search was reasonable as an incident of a lawful arrest.

Although the police had no warrant to search the petitioner's premises, apartment 13 at 81 Allen Street, it is clear that such a warrant is not an essential prerequisite of a lawful search. The courts have long recognized that a search may be constitutionally performed without a warrant as an incident of a lawful arrest [*United States* v. *Rabinowitz*, 339 U. S. 56 (1949); *Amiello* v. *United States*, 269 U. S. 20 (1925); *People* v. *Lane*, 10 N. Y. 2d 347 (1961); *People* v. *Defore*, 242 N. Y. 13 (1926)], and this Court has ruled that the legality of an arrest is determined by reference to state law [*United States* v. *Di Re*, 332 U. S. 581 (1948)].

In New York, Section 177 of the Code of Criminal Procedure furnishes the criteria of a lawful arrest. It provides *inter alia*:

> "A peace officer may, without a warrant, arrest a person,
>
> * * *
>
> "3. When a felony has in fact been committed, and he has reasonable cause for believing the person to be arrested to have committed it;
>
> "4. When he has reasonable cause for believing that a felony has been committed, and that the person arrested has committed it; * * *"

In *People v. Lane* [10 N. Y. 2d 347 (1961)] New York adopted the classic definition of probable cause first promulgated by Chief Justice Marshall.

> "[T]he term 'probable cause,' according to its usual acceptation, means less than evidence which would justify condemnation . . . It imports a seizure made under circumstances which warrant suspicion" [at p. 353].

Here, an analysis of the facts and circumstances within the knowledge of the police inevitably leads to the conclusion that the arrest of the defendant and the search of his premises were justified. First, of course, the police were aware of the commission of the crimes. Jim Ching had informed Detective Furst of the presence of three Puerto Ricans in the hallway moments before the murder. He gave the officer a description of a girl with long, black hair, and told of the black and white pocketbook which she carried, as well as describing one of her male accomplices (335, 337, 348-50). To this was added the account of the assault on Wong Sim as related to Detective Ihle. Wong Sim's description of the three Puerto Ricans, one of whom was a female with long black hair, coupled with the time and place of the attack, clearly placed these conspirators on the scene (328-30).

When Patrolman Ihle arrived at the scene of the crime and heard the information in Detective Furst's possession, he recalled that on July 14, two nights before, a Puerto Rican girl with long black hair complained of her lover who was quick to use a knife as means of persuasion or to settle a dispute (318-26, 350-9). By 7:15 a.m. on July 16, the police ascertained that the defendant and Carmen Reyes had just returned to their apartment, or, in other words, that they had not been home at the time the crime was committed or for several hours thereafter (334-8, 359-61).

Certainly at this point the police had a clear duty to investigate the whereabouts of the suspects, and in pursuance of their right to investigate they approached the door of apartment 13."

Detective Furst announced his authority (281, 361) and the door was opened by a Puerto Rican girl with long black hair. But more important, when the door opened the inside of the room was partially visible, and there, in open view, was a black and white pocketbook fitting the description given by Jim Ching (362-3; 365). The girl told the officers to "come in" (281-2, 339, 362) and further made clear her acquiescence by returning to bed and leaving the door open (362). Upon being invited inside, Detective Furst proceeded to question Carmen Reyes.

> "I said 'Is this your pocketbook?' She said, 'Yes.' I said 'Did you have this pocketbook with you tonight?' She said 'Yes'. And as I examined the pocketbook, I saw what appeared to be blood stains, and I asked her, I said, 'Carmen, why are these stains on the pocketbook?' She said she didn't know." (366).

At this point there had been no search. The pocketbook was in open view, and the blood stains were clearly visible to the naked eye. Such observations do not constitute a search and no probable cause is needed to effect the right of the police to investigate [*Rios* v. *United States*, 364 U. S. 253 (1960)].

An analogous situation is presented in *Ellison* v. *United States* [206 F. 2d 476 (D. C. Cir. 1953)]. There, officers suspecting the appellant of committing robbery, rang the doorbell to inquire into his whereabouts. While awaiting an answer, they observed the fruits of the crime in plain view through the open door. The court rejected the contention that the presence of the officers at the open door and the subsequent sighting of the contraband constituted

an illegal entry. The court observed that the police were present in furtherance of their right to investigate, and were not required to turn their heads when evidence was fortuitously presented to their inquiring eyes. [To the same effect, see *Hester v. United States*, 265 U. S. 57 (1924); *United States v. Lee*, 274 U. S. 559 (1927); *Cradle v. United States*, 178 F. 2d 962 (1949), cert. denied 339 U. S. 929 (1949).]

Everything observed by the officers dovetailed nearly with the eye witness account of Jim Ching, and the unexplained blood stains on the black and white pocketbook pointed to complicity in the recently committed crime. While such combination of facts and circumstances may not be sufficient to convict, that standard is not required to arrest or search (*Brinegar v. United States*, 338 U. S. 160 (1949)), and all the facts taken together clearly established that, at that point, suspicion was warranted and accordingly the police had probable cause to search the apartment or arrest the occupant.

Furthermore, the search which subsequently unearthed the murder weapon is not vitiated by the technicality that no arrest was first consummated. While evidence discovered by a search may not be used to validate an otherwise unlawful arrest, such search does not tell when probable cause to arrest existed before the search, regardless of whether the arrest was in fact performed first. In *People v. Simon*, 145 Cal. App. 2d 645 (1955)], the court, after extensively reviewing both Federal and California authority, concluded:

> "Thus if an officer is entitled to make an arrest on the basis of information available to him before he searches, and as an incident to that arrest is entitled to make a reasonable search of the person arrested . . . there is nothing unreasonable in his conduct if he makes the search before instead of after the arrest.

In either case the important considerations are whether the officer had reasonable cause before the search to make an arrest and whether the search and any seizures incident thereto were or were not more extensive than would reasonably be justified as incident to an arrest [see U.S. v. Rabinowitz, 339 U. S. 56, 60-64 (1950)]. We conclude, therefore, that a search is not unlawful merely because it precedes rather than follows the arrest."

[To the same effect, see, *People v. Johns*, 232 N. Y. S. 2d 1 (1962); *People v. Brocco*, 147 Cal. App. 2d 352 (1957); *People v. Martin*, 45 Cal. 2d 755 (1955); *People v. Bowles*, 45 Cal. 2d 652 (1955); *Clark v. State*, 78 Okl. Cr. 423 (1944); *State v. Ratolo*, 39 Wyo. 181 (1928); *Knight v. State*, 171 Ark. 882 (1926); *State v. McDaniel*, 115 Ore. 187 (1925); *State v. Reynolds*, 101 Conn. 224 (1924); *Inale v. Commonwealth*, 204 Ky. 518 (1924)].

In the present instance, the arrest was no pretense for a search, it in no way depended upon the product of the search, and was, in the strictest sense, contemporaneous. The entry of the police was solely to place the defendants under custody and the finding of the weapon prior to the imposition of actual physical restraint was the merest temporal fortuity.

Under the circumstances, the conduct of the police was entirely reasonable and therefore not proscribed by the Fourth Amendment of the United States Constitution. The police were reasonable in their initial suspicion of the defendant and his cohorts; they were reasonable in attempting to locate him for questioning; reasonable in thinking their suspicions confirmed by the pocketbook and its unexplained telltale blood smears seen on the premises; and reasonable in conducting a search of the apartment when their suspicions matured into probable cause to believe that the occupants perpetrated the crime which afforded grounds for arrest.

B. The search was lawful in that consent was validly obtained to conduct the search.

In addition to justification as an incident to a lawful arrest, it is clear that the consent of the occupants was validly obtained to authorize the inspection of the apartment. The question of whether consent was voluntarily given is one of fact which is to be decided by the weight of the evidence [*United States* v. *Dornblut*, 261 F. 2d 946 (2d Cir. 1958); *United States* v. *Martin*, 176 F. Supp. 262 (S. D. N. Y. 1959); *People* v. *Kortwright*, 236 N. Y. S. 2d 85 (N. Y. Co. 1962)]. In the present case there is no conflict in testimony. Detective Furst was invited into the apartment by Carmen Reyes after he had stated his authority (361), and he proceeded to question her about the blood-smeared handbag which he observed through the open door. She could not explain this inculpatory item (366) and, apparently to allay the suspicions of the police,

> "Cruz said, 'You know, what's the matter? We didn't do anything wrong. You want to search the place?' And then Carmen said, 'Yeah, go ahead and search the place.'" (366).

The appellant apparently contends that coercion should be implied merely from the presence of five police officers at the door. Yet no such conclusive inference vitiates consent freely given. While courts are rightfully hesitant to deem consent voluntary under such circumstances, an operable invitation to investigate may be tendered to law officers where the occupant has no reason to fear the outcome and may, indeed, expect vindication [see, *Hoxie* v. *United States*, 208 F. 2d 916 (8th Cir. 1953); *United States* v. *Dornblut*, *supra*; *People* v. *Kortwright*, *supra*]. That was the situation when the appellant and his paramour invited police inspection. The defendant had no way of knowing

that he was a prime suspect. He did not know that Jim Ching observed Carmen Reyes and her handbag through his peephole, or that Wong Sim could also furnish a description of Carmen Reyes, or that Patrolman Ihle would be on the case and connect the events of July 14 with the murder. And when Carmen Reyes could not explain the blood stains on the handbag, they both sought to divert the suspicions of the police by consenting to a search. The pocketbook had already been discovered, and they could not know that the knife which was subsequently found would incriminate them, since it had been previously washed of blood (947, 1140-1) and would appear to be an ordinary knife. In fact, it was only through the subsequent admission of Rafael Cruz that the knife was identified as the murder weapon (948; 1143). Even expert laboratory examination could not establish it to be the death weapon (677).

Thus, it was entirely logical to find that consent was voluntarily and freely given, and the trial court in hearing the facts was correct in its estimation of them.

Conclusion

The petition for a writ of certiorari should be denied.

Respectfully submitted,

FRANK S. HOGAN
District Attorney
New York County

H. RICHARD UVILLER
ALAN FREDERICK LEIBOWITZ
Assistant District Attorneys
Of Counsel

September 1963.

Office-Supreme Court, U.S.
FILED
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No. 413

Supreme Court of the United States

OCTOBER TERM, 1963

RAFAEL CRUZ,

Defendant-Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

PETITIONER'S REPLY BRIEF

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Supreme Court of the United States

OCTOBER TERM, 1963

RAFAEL CRUZ,

Defendant-Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

PETITIONER'S REPLY BRIEF

In the respondent's brief with respect to alleged observable evidence upon entry into an apartment the case of *People* v. *Loria*, 10 N. Y. 2d 363 at page 372, clearly renders such alleged evidence inadmissible:

> "The Fourth Amendment of the Constitution of the United States provides: 'The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.' It protects against 'unreasonable governmental intrusion' into the privacy of a person's home (*Silverman* v. *United States*, 365 U. S. 505, 511; *Jones* v. *United States*, 357 U. S. 493, 498), and any evidence discovered as a result of such an intrusion is now constitutionally tainted and in-

admissible in a State court (*Mapp* v. *Ohio*, *supra*). It has been held that it matters not that the evidence was in open view and disclosed by the officers' mere observation, (*Accarino* v. *United States*, 179 F. 2d 456); that it came to the officers' attention as the result of the defendant's abortive attempt to secrete or dispose of it (*Hobson* v. *United States*, 226 F. 2d 890; *Work* v. *United States*, 243 F. 2d 660); or that it was turned up after a more conventional search of defendant's premises (*Weeks* v. *United States*, 232 U. S. 383; *United States* v. *Jeffers*, 342 U. S. 48; *Taylor* v. *United States*, 286 U. S. 1; cf. *Hester* v. *United States*, 265 U. S. 57).

In the instant case, Detective Short, while in Perillo's apartment, observed the latter pick up the case containing the heroin from the bedroom floor and drop it out of the window. Unless the officer's presence in the apartment can be justified, it constituted an unlawful intrusion into the home, and the evidence thereby discovered would be inadmissible.

"The Fourth Amendment, as noted, condemns only those searches and seizures which are unreasonable (*Harris* v. *United States*, 331 U. S. 145, 150). A search is reasonable if conducted pursuant to a legal search warrant, by consent, or incident to a lawful arrest. In the present case, the search was not made under a search warrant. Nor was there on this record a consent search. There was, at most, acquiescence on defendant's part to talk to the officers inside Perillo's apartment, but Perillo would not open his door. It may hardly be said that the unlocking of the door by Perillo's wife was a consent to search the apartment, for entry gained by submission to authority after a threat to kick down the door is not entry gained by consent (*Johnson* v. *United States*, 333 U. S. 10, 13; *Amos* v. *United States*, 255 U. S. 313, 317; *Catalanotte* v. *United States*, 208 F. 2d 264, 268)."

Further, in none of the cases cited by the respondent's brief on pages 6 and 7 with respect to the alleged evidence was there an entry into a home or apartment but rather dealt with a seizure in a car, porch, boat and person.

The record reveals that the defendant was taken to the Police Station at 7:55 A. M. from his home and without counsel and the record is barren as to whether he was advised of his rights, was interrogated without counsel, for 9 to 10 hours and then booked at 6:00 P. M. at a time too late for arraignment of this type of charge in New York City Courts (f. 292), which again confirms the lack of probable cause for the arrest and violating the McNabb-Mallory-Spano rule.

Belief, however well founded, that an article sought is concealed in a dwelling house furnishes no justification for a search of that place without a warrant (*Aguilar* v. *United States*, 289 F. S. 33; *Jones* v. *U. S.*, 357 U. S. 497. The pocketbook could not have been lawfully seized under the circumstances much less the knife found hidden beneath clothing on top of a bureau drawer.

The lack of probable cause is further evident by the lack of an informer, much less a reliable informer and the record is barren that the police officers had consulted some kind of official list or had some information of some kind which had narrowed the scope of their search to Rafael Cruz and reasonable cause under Section 177 of the Code of Criminal Practice to believe he committed the alleged murder. There may be suspicion here and good faith but that is not sufficient. It is basic that an arrest without a warrant must stand upon firmer ground than mere suspicion and good faith. *Henry* v. *United States*, 361 U. S. 101.

The alleged assault of one Wong Sing, an unknown, who failed to testify at trial nor was there any proof offered that he had either signed a complaint or made any state-

ment at the police station must be discounted as fiction and an effort to establish probable cause for the arrest of the defendant but even there the description of three Puerto Ricans is abundantly insufficient and of shadowy substance, and so sparse that no arrest warrant could issue, and if it did it would lack probable cause.

In *Brinegar* v. *United States*, 338 U. S. 160 at page 175, "the substance of all the definitions of probable cause is a reasonable ground for belief of guilt." The officers had not observed the crime in its commission and therefore in the case at bar once the officers entered the apartment they began a fishing expedition and finding the concealed knife after searching several minutes as well as observing the pocketbook the purpose to search transcended the purpose to arrest and was unlawful. *Gilbert* v. *United States*, 291 F. 2d 586; *Lee* v. *United States*, 232 F. 2d 354; *Mapp* v. *Ohio*, 367 U. S. 643.

Lack of Consent

It must be affirmatively shown that there was no duress or coercion actual or implied. "Invitation" to enter one house extended to armed officers of the law who demand entrance are usually to be considered as invitations secured by force. *Judd* v. *United States*, 190 F. 2d 649 at 651.

When five (5) armed police officers without a search warrant in a murder case crowd around an apartment door it would appear obvious that there was not much else Carmen Reyes could do but remove the wire latch from the door. As the Prosecution concedes on page 9 of the respondent's brief that courts are rightfully hesitant to deem consent voluntary and in the case at bar Carmen Reyes had every reason to fear the outcome and could not expect vindication of her participation.

It would seem manifestly clear from the record that the action of Carmen Reyes in opening the door (f. 361) and then jumping into bed (f. 366) is highly inconsistent and it could easily be inferred that both parties had been sleeping at the time the police apparently crashed into the apartment.

Statement by Cruz at the Police Station

Cruz declared in his written statement (ff. 1117-64) that "Bolo" Perez a co-defendant who received 10 to 20 years stabbed Lopez which the respondent's brief inadvertently failed to state at page 3.

Wong Sun v. *United States*, 371 U. S. 471, at page 485, establishes in line with *Silverman* v. *United States*, 365 U. S. 505, that verbal evidence which derives from an unlawful entry and an unauthorized arrest is no less the "fruit" of official illegality than the more common tangible fruits of the unwarranted intrusion.

In the case at bar from the record it is established that the knife was demonstrated to the defendant at the Police Station after long interrogation before a verbal admission came (f. 498) and said admission falls within the exclusionary rule

CONCLUSION

The petition for a Writ of Certiorari should be granted.

Respectfully submitted,

James J. Hanrahan,
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250 West 57th Street,
New York, New York.